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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ERIC SCOTT DENTON, Defendant and Appellant.	E035197 (Super.Ct.No. RIF112269) **OPINION**

APPEAL from the Superior Court of Riverside County. Robert J. McIntyre, Judge. Affirmed.

Kent Douglas Baker, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Scott C. Taylor, Supervising Deputy Attorney General, and David Delgado-Rucci, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant guilty of attempted robbery (Pen. Code, §§ 664/211)[1] (count 1), burglary (§ 459) (count 2), false imprisonment (§ 236) (count 3), and possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) (count 4). In addition, the jury found true that as to counts 1 through 3 that a principal in the crimes was armed with a firearm (§ 12022, subd. (a)(1)). Defendant was sentenced to a total term of seven years in state prison as follows: the upper term of six years on count 2 plus a consecutive one-year term for the firearm enhancement; concurrent upper terms were also imposed on counts 1, 3, and 4, and the firearm enhancement attached to counts 1 and 3. Defendant's sole contention on appeal is that he was deprived of his federal and state constitutional rights to a jury trial and due process under *Blakely v. Washington* (2004) 542 U.S. __ [124 S.Ct. 2531, 159 L.Ed.2d 403] and *Apprendi v. New Jersey* (2000) 530 U.S. 466 when the trial court imposed the upper terms without jury findings of aggravating circumstances. We reject this contention and affirm the judgment.

I

FACTUAL BACKGROUND

On September 10, 2003, approximately 3:30 p.m., defendant (a White male) and a Hispanic man named Rudy drove to an auto electric business on Mission Boulevard in Riverside. The business was located behind a house lived in by Antonio Garcia, his wife Marina Chavez, their son Guillero Chavez, Marina's sister Vereniza Garcia, and Verenzia's children Jose and Jacqueline.

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[1] All future statutory references are to the Penal Code unless otherwise stated.

Rudy arrived in a Green Cherokee and drove directly up into the driveway. A black Expedition pulled up perpendicular to and behind the Cherokee. Rudy walked over to Antonio and placed a gun against his head while defendant went inside the house. Rudy threatened to kill Antonio and his family if Antonio did not give him all of the drugs and drug money Antonio allegedly had stashed away. Rudy asked for the drugs and money about 10 times. Antonio told Rudy there was a mistake because he had no drugs or money. Rudy then hit Antonio across the face with the gun. After Antonio fell to the ground, bleeding from his nose, Rudy got back into the Cherokee and honked the horn. Defendant exited house and got into the black Expedition, and both vehicles left. Antonio then ran to the street, saw an officer, flagged the officer down, and told him what had occurred.

Marina was cooking in the kitchen with her mother, her sister, and the children when defendant walked into the house and told them not to move. Defendant had a roll of duct tape in his hands and appeared nervous. Marina tried to leave the kitchen to go find her husband, but defendant forcefully grabbed her by the arm and prevented her from leaving. When Marina's mother, sister, and sister's six-year-old son grabbed defendant, hit him, and jumped on his back, Marina ran to the back of the electronic shop, yelling to her husband that a man was in the house. Marina saw that there was a black Expedition and a green Cherokee parked outside on the driveway. She also saw her husband with a Hispanic man (Rudy) who had a gun pointed at her husband's head. Marina then started screaming and running towards a neighbor's home. Rudy told her to shut up and not to call the police or he would shoot her husband. Marina then returned to the house, where defendant was standing in front of the door keeping the rest of the

family inside. Marina heard a horn honk, and defendant left. She saw both vehicles pull away but was unable to get their license plate numbers. The police then arrived, and she informed them what had happened.

Riverside County Sheriff Community Service Officer Bonita Woodward was flagged down near the residence and was given descriptions of the vehicles involved in the incident. The green Cherokee was stopped on westbound route 60. There were two occupants in the vehicle; defendant was the passenger. A loaded .45-caliber pistol and a roll of duct tape were recovered from the Cherokee. Antonio was taken to the location where the Cherokee was stopped and identified defendant as one of the men who were involved in the crimes.

After defendant was arrested and waived his constitutional rights, he gave a statement to the police. Defendant acknowledged that he went to the home on Mission Boulevard with his friend Rudy and claimed that Rudy went inside the house while he waited outside. Defendant then admitted that he went inside the house and said that he did not know anything about the "drug house." A baggie of methamphetamine was found in defendant's sock at the time of his arrest.

II

DISCUSSION

In *Blakely v. Washington*, *supra*, 124 S.Ct. 2531 (*Blakely*), the United States Supreme Court reaffirmed the conclusion it had reached in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466 (*Apprendi*): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, at p. 490;

Blakely, at p. 2536.) In *Blakely*, the court further stated that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.]" (*Blakely*, at p. 2537.)

Relying on *Blakely*, defendant argues the court's imposition of the upper term of six years for his offense in count 2 (residential burglary) violated his constitutional rights to a jury trial and due process. Defendant notes that under section 1170, subdivision (b) where a statute prescribes three possible terms for a crime, the court "shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." He reasons that, under *Blakely*, the maximum statutory punishment in such a case is the middle term, because that is the most the court can impose based solely on the facts reflected in the jury's verdict, without any additional findings of aggravating circumstances. Therefore, defendant contends, any fact used to impose a sentence greater than the middle term must, under *Blakely*, be found by a jury beyond a reasonable doubt. As the aggravating circumstances on which the court relied in this case to exceed the middle term were not so found, defendant concludes the imposition of the upper term violated *Blakely*.[2]

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[2] The California Supreme Court currently has before it a case presenting the issue of whether *Blakely* precludes a trial court from making findings on aggravating factors in support of an upper term sentence (*People v. Towne*, review granted July 14, 2004 (S125677)) and a case presenting the issues of whether *Blakely* affects the validity of the defendant's upper term and the trial court's imposition of consecutive sentences (*People v. Black*, review granted July 28, 2004 (S126182)).

In response, the People argue defendant forfeited his *Blakely* claim because he did not object to the upper term based on his Sixth Amendment right to a jury trial, the right on which the Supreme Court's decision in *Blakely* was based.[3] (See *Blakely*, *supra*, 124 S.Ct. 2531, 2534.) They go on to argue that even if the claim was not waived, it is not meritorious because (1) *Blakely* does not preclude a judge from imposing an upper term based on aggravating circumstances not found by a jury, because the maximum statutory punishment for *Blakely* purposes *is* the upper term rather than the middle term; (2) *Blakely* exempts from the jury trial requirement any aggravating circumstance based on the fact of a prior conviction, such as the severity of the defendant's criminal record (on which the court relied in this case), which was enough by itself to justify the upper term; and (3) any *Blakely* error was harmless beyond a reasonable doubt because the evidence of aggravating circumstances in this case was overwhelming and uncontradicted.

We note that an appellate court has discretion to consider constitutional issues raised for the first time on appeal, "especially when the enforcement of a penal statute is involved [citation], the asserted error fundamentally affects the validity of the judgment [citation], or important issues of public policy are at issue [citation]." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) Defendant's *Blakely* claim satisfies these criteria, and we therefore would exercise our discretion to consider it even if we were to conclude the

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[3] "[T]he terms 'waiver' and 'forfeiture' long have been used interchangeably. As the United States Supreme Court has explained, however, '[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." [Citations.]' [Citation.]" (*People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9.) However, as some decisions refer to similar arguments as claims of waiver, we will use that term in our discussion.

People's waiver argument is well taken, which we do not. We turn now to the merits of the *Blakely* claim.

As noted, the People defend the imposition of the upper term in this case on the grounds that (1) *Blakely* does not preclude a judge from imposing an upper term based on aggravating circumstances not found by a jury; (2) *Blakely* exempts from the jury trial requirement any aggravating circumstance based on the fact of a prior conviction; and (3) any *Blakely* error was harmless beyond a reasonable doubt. We agree with the People's second argument and therefore do not address the other two.

Both *Apprendi* and *Blakely* recognize that "the fact of a prior conviction" can be found by a judge, even though any *other* fact that increases the maximum statutory penalty for a crime must be found by a jury. (*Apprendi*, *supra*, 530 U.S. 466, 490; *Blakely*, *supra*, 124 S.Ct. 2531, 2536.) The *Apprendi* exception for prior convictions has been *broadly interpreted* by California courts. (*People v. Belmares* (2003) 106 Cal.App.4th 19, 27-28.)

Thus, in *People v. Thomas* (2001) 91 Cal.App.4th 212, the defendant argued the trial court violated *Apprendi* by finding, without a jury, that he had suffered a prior prison conviction for purposes of section 667.5. The Court of Appeal acknowledged that a section 667.5 enhancement requires more than a mere conviction, because the accused also must have served a prison term as defined in the statute. (*Thomas*, at p. 216.)

However, the *Thomas* court found the *Apprendi* exception for "the fact of a prior conviction" was broad enough to cover a determination that the defendant had served a prison term: "Courts have not described *Apprendi* as requiring jury trials on matters other than the precise 'fact' of a prior conviction. Rather, courts have held that no jury

trial right exists on matters involving the *more broadly framed issue of 'recidivism*.' [Citations.] Appellate courts have held that *Apprendi* does not require full due process treatment to recidivism allegations which involved elements merely beyond the fact of conviction itself. [Citations.]" (*People v. Thomas*, *supra*, 91 Cal.App.4th 212, 221-222, italics added.)

The California Supreme Court reached a similar conclusion in *People v. Epps* (2001) 25 Cal.4th 19. In *Epps*, the court held the *Apprendi* exception applied not only to the determination that the defendant had suffered a prior conviction, but also to the determination that the conviction was for a serious felony for purposes of the three strikes law: "[O]nly the bare fact of the prior conviction was at issue, because the prior conviction (kidnapping) was a serious felony by definition under section 1192.7, subdivision (c)(20)." (*Epps*, at p. 28.)

In view of these decisions, we conclude it was proper, notwithstanding *Apprendi* and *Blakely*, for the court to determine based on the probation report that defendant's prior convictions were numerous or of increasing seriousness and that defendant had previously served prison terms. (Cal. Rules of Court, rules 4.421(b)(2) and 4.421(b)(3).) If it is not a violation of *Apprendi* and *Blakely* for a court to determine that a prior conviction resulted in a prison term (*Thomas*) or that the conviction was for a serious felony (*Epps*), then it was not improper in this case for the trial court to determine defendant's prior convictions were numerous or of increasing seriousness. That determination is just as closely connected to "the more broadly framed issue of 'recidivism'" (*People v. Thomas*, *supra*, 91 Cal.App.4th 212, 222) as were the

determinations which were held to come within the *Apprendi* exception in *Thomas* and *Epps*.

It was proper for the court to make that determination based on the probation report: "In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports[,] . . . statements in aggravation or mitigation . . . and any further evidence introduced at the sentencing hearing." (§ 1170, subd. (b).) Further, one factor in aggravation is sufficient to justify the upper term. (*People v. Steele* (2000) 83 Cal.App.4th 212, 226.) Accordingly, even if a trial court in imposing the upper term cites one or more invalid aggravating factors, if there remains one valid factor no remand is required. (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1759.)

Blakely does not affect this principle of state law. *Blakely* only declares it unconstitutional to increase the maximum punishment for an offense based on a fact that has been *improperly* found by a judge instead of a jury. If there is at least one aggravating circumstance that has been *properly* found by the judge, then the upper term becomes available based on that fact. In that case, even if the judge has improperly found one or more *additional* aggravating facts, there has been no *Blakely* violation. The improperly found fact or facts have not been used to *increase* the statutory maximum. Rather, the statutory maximum -- the upper term -- has become available based on the properly found aggravating circumstance, without regard for the improperly found fact or facts.

Here, then, once the court found defendant's criminal offenses were extensive or escalating -- a determination we have concluded the court could make under *Apprendi*

and *Blakely* -- it could impose the upper term without regard for whether other aggravating circumstances existed. The record reveals that defendant had previously been convicted of numerous drug-related offenses; that at the time he committed the instant offenses, defendant was on probation; and that defendant's prior performance on probation was unsatisfactory.

We therefore reject defendant's claim that his sentence violated *Apprendi* and *Blakely*.

III

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

KING
J.